Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

May 2007

Untimely response to interrogatories does not preclude order to compel. In *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (Cal. App. Second Dist., Div. 5; March 8, 2007) 148 Cal.App.4th 390, [55 Cal.Rptr.3d 751, 2007 DJDAR 3248], defendant served purported responses to interrogatories after plaintiff had filed and served a motion to compel responses. Plaintiff did not take the motion off calendar. The court heard and ruled on the motion, awarding sanctions to plaintiff without defendant appearing at the hearing or filing opposition. The Court of Appeal affirmed, holding that the serving of the late responses did not deprive the court of authority to hear the motion to compel.

Note: In the same case, the court also held that a purported response to an interrogatory stating "unable to respond," was not an authorized response.

Court may not dismiss where terms of settlement are uncertain. *Cal. Rules of Court*, rule 3.1385 (former rule 225(c)) provides that when a case is settled the parties must either notify the court and file a motion to dismiss the case, or show cause why the case should not be dismissed on the court's own motion. But the trial court erred when it dismissed an action while the parties still had not agreed on all of the material terms of the settlement. *Levitz v. The Warlocks* (Cal. App. Second Dist., Div. 8; March 12, 2007) 148 Cal.App.4th 531, [55 Cal.Rptr.3d 800, 2007 DJDAR 3373].

Order awarding fees after expunging lis pendens is not appealable. *Code Civ. Proc.* §405.38 provides that a party prevailing on a motion to expunge a lis pendens is entitled to its reasonable attorney fees. Plaintiff appealed from an order awarding fees to defendant after the latter successfully moved to expunge a lis pendens. The Court of Appeal dismissed the appeal because §405.39 provides that an order granting or denying expungement of a lis pendens and accompanying orders are not appealable. The only form of appellate relief under the statute is a petition for writ of mandate filed in the appellate court and, pursuant to the statute, such a petition must be filed and served within 20 days of service of written notice of the order. *Shah v. McMahon* (Cal. App. Second Dist., Div. 5; March 12, 2007) 148 Cal.App.4th 526, [55 Cal.Rptr.3d 792, 2007 DJDAR 3371].

Is there is poetry in sexual harassment? In *Baldwin v. BlueCross/BlueShield of Alabama* (11th Cir. March 19, 2007) (Case No. 05-15619) [20 Fla. L. Weekly Fed. C 420], the 11th Circuit affirmed the dismissal of a sexual harassment case. The case was based on allegations that plaintiff's supervisor, Head, had propositioned her and played with his zipper in her presence. But the employer had a detailed plan for the reporting of sexual harassment charges and plaintiff had failed to avail herself of the opportunity to report the misconduct to the employer. This was fatal to her case. The opinion also stated, "[i]f, as John Marshall Harlan suggested, it is 'often true that one man's vulgarity is another's lyric,' then Head was quite lyrical around the office."

When seeking to set aside dismissal prompt action is needed. In *Mansour v. Degas* (Cal. App. Second Dist., Div. 8; March 23, 2007—ordered depublished April 9, 2007) 148 Cal.App.4th 1167, [2007 DJDAR 3947], plaintiff moved to set aside a dismissal entered for failure to attend a mandatory settlement conference. He claimed the notice of dismissal had been sent to his old address. But he learned of the dismissal in late 2003 and did not file his motion to set it aside until early 2005. Too late. Faced with this long delay, the trial court did not abuse its discretion in denying the motion.

Mistake in decision to go pro per not subject to §437 relief. Ms Burnete decided she could represent herself in a personal injury suit.

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

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She did. She made mistakes. She lost the case. Then, through counsel, she moved to set aside the judgment under *Code Civ. Proc.* § 473(b). Under the statute, the court may relieve a party from a judgment entered against her due to mistake or excusable neglect. She lost again. She appealed. The Court of Appeal affirmed the denial of the §473 motion, noting that if plaintiff were entitled to the relief, no judgment against a self-represented defendant would ever be final. *Burnete v. La Casa Dana Apartments* (Cal. App. Fourth Dist., Div. 3; March 26, 2007) 148 Cal.App.4th 1262, [2007 DJDAR 4009].

Terminating sanctions approved for discovery abuses. For an example of how not to deal with discovery requests, *see*, *Reedy v. Bussell* (Cal. App. Fourth Dist., Div. 3; February 23, 2007 – ordered published March 26, 2007) 148 Cal.App.4th 1272, [2007 DJDAR 4057]. Although the Court of Appeal affirmed the terminating sanctions it held that, after the subsequent default hearing, the court could not award damages in excess of those prayed for in the complaint.

Court must determine prevailing party where case settles. In *Kim v. Euromotors West/The Auto Gallery* (Cal. App. Second Dist., Div. 8; April 2, 2007) 149 Cal.App.4th 170, [2007 DJDAR 4373], the parties settled with defendant agreeing to pay plaintiff $70,000. Thereafter, plaintiff sought attorney fees (allowable under the statute on which the suit was based) and costs. The trial court held that, because the parties settled, there was no "prevailing party." Wrong! The Court of Appeal reversed; unless the settlement agreement provides otherwise, the court must determine who prevailed and award fees and costs accordingly.

Note: When entering into a settlement on behalf of your client, be sure to consider whether the agreement should contain a provision waiving fees and costs.

Terminating sanction only proper for party propounding discovery. In *Parker v. Wolters Kluwer United States, Inc.* (Cal. App. Second Dist., Div. 7; April 3, 2007) 149 Cal.App.4th 285, [2007 DJDAR 4461], plaintiff repeatedly failed to respond to discovery requests by one of several defendants. Ultimately the court struck his complaint and entered a default on his cross-complaint. The Court of Appeal reversed as to those defendants who had not propounded any discovery requests. The court recognized that such sanctions might have been proper if these defendants had shown that they too were prejudiced by plaintiff's failure to respond to the other party's discovery requests. They had made no such showing.

Litigation privilege trumps privacy rights. The litigation privilege (*Civ. Code* §47 (b)) presents a complete bar to causes of action arising out of statements made in the course of litigation. The only exception is a cause of action for malicious prosecution. A letter filed in a family law proceeding accusing plaintiff of sexual misconduct is privileged, notwithstanding the fact that plaintiff might otherwise have a cause of action for invasion of a right to privacy under the *California Constitution*. *Jacob B. v. County of Shasta* (Cal.Supr.Ct.; April 5, 2007) 40 Cal.4th 948, [2007 DJDAR 4533].

Model Code of Civility and Professionalism

As Litigation Section members you can review the Model Code of Civility and Professionalism. We encourage you to do so and post your comments on the Discussion Board at http://members.calbar.ca.gov/discuss